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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term 1980

No. _____

CONSOLIDATED OIL & GAS, INC., ESTATE OF JOHN M. KING, BANKRUPT, and LAKESHORE ASSOCIATES,

Petitioners,

vs.

KING RESOURCES COMPANY, CHARLES A. BAER, TRUSTEE OF KING RESOURCES COMPANY and PHOENIX RESOURCES COMPANY (a reorganized company formerly known as King Resources Company),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August 15, 1980

In the
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Consolidated Oil & Gas, Inc., Estate of John M. King, Bankrupt and Lakeshore Associates, respectively pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 31, 1980.

I.

QUESTIONS PRESENTED

1. Do the due process clause and the standards of judicial conduct prescribed in 28 U.S.C. §455(a), require a judge to disqualify himself, *sua sponte,* when he announces, before all the evidence has been presented to him, that he could not make any findings which were not completely consistent with those he had recently made in another matter?

2. Is the proper measure of damages to be applied to a loss of a stream of income expected to be generated in the future from oil and gas properties, the net present worth of that income stream or the fair market value of the acreage from which it will be produced?

3. Does the Expected Monetary Value (EMV) probability theory and its formula, a valuation procedure without judicial sanction prior to this proceeding, which, as applied in this matter, relies on assumptions rather than known data, provide a reliable measure of damages for breach of contract?

4. Can a reorganization judge validly find a contract to have a positive value to justify its rejection as executory and a negative value when determining the damages to be allowed for its rejection?

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III

OPINIONS BELOW

The opinion of the Court of Appeals marked by the Court "not for routine publication," appears in the appendix filed herewith. The opinion of the District Court, likewise unpublished, also appears in the appendix.

IV

GROUNDS FOR JURISDICTION

Federal jurisdiction existed in the District Court and the Court of Appeals under the provisions of now superseded 11 U.S.C. §1, *et seq*, which jurisdiction continues, so far as this proceeding is concerned, under §403.(a) of Pub. Laws 95-598 Title IV, November 7, 1978, 92 Stat. 2683.

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 31, 1980.

A timely Petition for Rehearing en banc was denied on June 6, 1980 and this Petition for Certiorari is being filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 USC §1254(1).

V

STATUTES INVOLVED

Now superseded 11 USC Secs. 516(1) and 602 are reprinted in the appendix.

VI

STATEMENT OF THE CASE

King Resources Company, (KRC), the owner of a large number of oil and gas exploratory permits issued by the Canadian government covering approximately 23

million acres located north of the Arctic Circle, which carried work obligations in order to earn the permits, agreed in 1969 to sell undivided interests therein: to Consolidated Oil & Gas, Inc. (Consolidated), a 1/32nd interest, to John M. King, a 1/64 interest, and to what is now Lakeshore Associates, a 1/128 interest, on contracts which required down payments, further cash payments and contributions toward a KRC planned exploratory program.

In August of 1971 an involuntary Petition for Corporate Reorganization was filed against KRC. From October 18, 1971 until mid-1979 KRC was operated through a reorganization trustee, namely Charles A. Baer, under the supervision of the United States District Court for the District of Colorado. On the latter date the company which emerged from the reorganization proceedings resumed operations under the name Phoenix Resources Company.

In March of 1972 the reorganization trustee sought permission under 11 USC §516(1) to reject the contracts with Consolidated and John M. King. Lakeshore and the Trustee stipulated to the rejection of the Lakeshore agreement. A rejection of the King agreement by the District Court, as an executory contract, was affirmed in *King v. Baer*, 482 F.2d 552 (10th Cir. 1973).

The Consolidated contract was not rejected until January, 1977. Consolidated did not oppose the rejection because it was committed to the contention that the permit properties by virtue of the increasing demand for oil and gas, had now become so valuable that the Court would have no other choice than to reject the agreement in the best interests of the reorganization effort and relegate Consolidated to a claim for damages as provided in 11 USC §602.[1] Witnesses presented both by the

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[1]Opposition to the rejection would have been futile for the only consideration before the court was whether the rejection was in the best interests of the reorganization — a matter of business judgment. See *Institutional Investors v. Chicago, M.ST.P&P*, 318 US 523, 550 (1942) and *King v. Baer*, 482 F.2d 552, 557 (10th Cir. 1973).

Trustee and Consolidated testified to values from which the court found the rejection to be in the best interests of the Debtor. Until the rejection, Consolidated made its required contributions toward the ongoing exploration expenses to Sun Oil Company, a company to which KRC had sold percentage interests in the permit properties and to which company KRC had traded down much of its remaining interests.

Consolidated then filed a claim for damages for breach of contract by reason of the rejection. The claims of the Estate of John M. King, Bankrupt, and Lakeshore Associates were consolidated for hearing with the Consolidated claim. The measure of damages was understood by all parties to be that afforded by state law for breach of contract. The issue then before the District Court was the amount, if any, of damages flowing to the Petitioners from the rejection and the proper measure of such damages. Was it the present worth of the net income stream estimated by the experts to flow from the future production of oil and gas from the permit properties, as contended for by the Petitioners, or, was it, in the absence of comparable sales, the market value of the acreage based on the EMV probability theory[2] based wholly on assumptions espoused by the Trustee, supported only by evidence of some farmouts and minor trades?

Both sides filed and exchanged, approximately two weeks prior to the hearing, reports showing how they computed damages. Petitioners relied on the net present worth of the expected income stream; the Trustee attempted to describe a per acre value to the properties. On the morning the hearing opened however (August 29, 1977) the Court permitted the Trustee to file a second report which became the basis for the District Court's eventual valuation figure. The Court first heard the experts explain the Petitioners' report and then heard from the Trustee's expert who placed much reliance on

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[2]The EMV theory is discussed in "Decisions Under Uncertainty," (1960) by C. Jackson Grayson, published by Harvard Business School, Division of Research. (Library of Congress Catalog Card No. 60-11281) pp. 231-278.

EMV theory. Cross examination developed however that the detailed information and data used in preparing the Trustee's experts' most recent report, including the use made of the EMV formula, was available only in Canada. Without the detail it was impossible to determine whether the formula provided a reliable measure of value or had been properly applied. The Court on August 31, 1977, recessed the hearing to allow Petitioners' experts an opportunity to examine the detailed data in Canada with the *proviso* that the Petitioners could later present further testimony, by way of rebuttal, in deposition form, all to be filed and considered by the Court.

After their examination of such material, Petitioners' experts then testified on deposition in criticism of the application made by the Trustee's expert of the EMV probability theory. The Trustee presented no evidence to refute this criticism.

The District Court, in view of the escalating oil and gas prices prevalent in the industry, in September and early October, 1977, however conducted further valuation hearings in the reorganization proceeding and there arrived at a value for KRC's Canadian Arctic properties for reorganization purposes on the basis recommended by the Trustee's expert which relied heavily on the EMV probability theory. On October 7, 1977, the Court confirmed the Trustee's plan of reorganization. The Court had not yet ruled on Petitioners' damage claims since the rebuttal testimony, presented by depositions was not taken until October 11, 1977. At a hearing held on a stay application in the reorganization proceedings on December 21, 1977, however, the Court announced that it had concluded to deny Petitioners' damage claims,[3] stating it would be inconsistent to make any findings on Petitioners' damage claims which were not completely consistent with the values the Court had now placed on KRC's Canadian Arctic acreage for reorganization

[3] "THE COURT: It would be totally inconsistent for me to make any findings on your claim which were not completely consistent with the findings I have heretofore made in some detail on the value of the assets in the Canadian Arctic." (App. 01088-01089)

purposes and offered to deny Petitioners' claims immediately without entering any further findings and conclusions.

At Petitioners' request the District Court later did enter written findings in the form of a Memorandum Opinion. (App. pp. 29-38). Such findings credited the EMV method of valuation, verified to some extent by farmouts and minor trades, as presented by the Trustee's expert, rejected the net present worth of the income stream theory as the proper measure of damages, as contended for by Petitioners, and held Petitioners had suffered no damages since it perceived the Petitioners' interests in the permits were worth less than the balance due under their respective contracts on the purchase price. The reorganized company, Phoenix Resources, now owns the percentage interests the Petitioners had agreed to buy and the estate in reorganization retained all payments made to KRC on the contracts.

Although it never discussed the validity of the EMV theory adopted by the District Court or expressly concluded whether it has been correctly applied, the Court of Appeals held the District Court had been presented with well defined theories or methods of valuation, that it properly chose to use that advanced by the Trustee and that it had arrived at findings of fact which were not clearly erroneous and in accord with the applicable state law.

Petitioners' contention that the reorganization judge, who announced before concluding the hearing on Petitioners' claims, that he had to be consistent and adhere to the values he had in the meantime adopted for reorganization purposes, should have called in another judge not wedded to the reorganization plan to complete the damage hearing, was brushed aside as being too late whether or not it had any validity.

VII

ARGUMENT

REASONS FOR GRANTING THE WRIT

The Court of Appeals has permitted a District Judge to so far depart from the accepted and usual course of judicial proceedings as to call for the application of this Court's supervisory powers in that it:

1. Has permitted a District Judge to substitute his decision in one case as the decision in another matter;

2. Has also permitted a District Judge, who was called upon to determine the value of a stream of income to commence in the future, to select and then misapply a probability theory of valuation which had not theretofore been accepted as valid by any court anywhere;

3. Has also permitted a District Judge in a reorganization proceeding to reject an executory contract on the premise that it was more valuable to the reorganization effort to reject it rather than perform it and then to reverse gears and deny any claim for its rejection by holding it had no net value to the claimant.

THE DUE PROCESS CLAUSE AND 28 USC Sec. 455(a) REQUIRED THE TRIAL JUDGE TO RECUSE HIMSELF, SUA SPONTE

Vital it is, in our system of jurisprudence that litigants believe they have received a fair trial before a fair tribunal. A sine qua non of this principle is that trial judges do not announce their judgments before all the evidence has been received and considered.

This Court has not yet interpreted the language of 28 USC Sec. 455(a) which by its terms requires *sua sponte* recusal in all instances where "impartiality might reasonably be questioned" but the decisions rendered below in this case vividly show the congressional prohibition is not being adhered to and due process has been denied. Only a decision of this Court will assure that this situation does not arise again and again.

Although this Court has considered judicial disqualification in the due process context in a number of cases, the Court has not yet had occasion to make it clear to the lower courts that this section is intended to be self-executing and is directed at the judge himself to be applied without stimulus from the litigant at the moment it becomes apparent that a conflict has arisen.

Congress, following the adoption by the Judicial Conference of the Code of Judicial Conduct, has adopted specific rules designed to insure impartiality by prohibiting judges from sitting where their impartiality might reasonably be questioned; 28 USC §455(a), as amended in 1974. The Court of Appeals in the instant proceeding mistakenly assumed that §455(a) requires affirmative recusatory action by the litigant. It mistakenly ignored the clear congressional intent that §455(a) is not only mandatory and directed at the judge himself but that it may also be raised at any time.[4]

When a litigant, who has not yet presented all his evidence, hears the trial judge declare that he has already decided to find against him on the basis of a decision he has just made in another matter, then would a reasonable man have a reasonable doubt as to whether he had received a fair trial in a fair judicial system? Under the circumstances presented in this case, it is abundantly clear that any reasonable man would think he had a reasonable factual basis for doubting his judge's impartiality.

The trial judge should have known §455(a) imposed upon him a duty, *sua sponte*, to call in another judge to conclude and decide this matter as soon as he knew he would apply his recent ruling in the reorganization proceeding to the instant matter.

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[4]The Department of Justice had recommended that the revised §455 should include some time limitation (H.R. Rep. No. 1453, 93rd Congress 2nd Session 9 (1974) US Code Congressional & Administrative News, 1974 p. 6358). But Congress did not include that recommendation in the statute.

DAMAGES FOR BREACH OF CONTRACT, WHERE ONE IS DEPRIVED OF AN INCOME STREAM TO BE GENERATED IN THE FUTURE, IS THE NET PRESENT WORTH OF THE INCOME STREAM AND NOT THE VALUE OF THE ACREAGE DETERMINED ON A FAIR MARKET VALUE BASIS

The contracts which were rejected by the District Court as executory would have enabled the Petitioners to participate in the future flow of oil and gas from Canadian Arctic Island properties. It would have enabled them to share in the expectant flow of income that all the witnesses and the District Court agree will eventually be realized from the permit properties. The contest between the Petitioners and the Trustee revolved around the proper measure of damages applicable to a breach of contract under state law and the amount of such damages. There were no sales of comparable properties.

There is a paucity of precedent relating to the proper measure of damages to be applied to the breach of an oil and gas contract where the properties are not expected to be producers until some time in the future.[5] In view of today's energy crisis it can be anticipated that extensive litigation will ensue wherein the lower federal courts will need guidance in applying proper damage rules. It is vitally necessary that this Court prescribe the proper rules now so that lower courts will not flounder as they did here.

The District Court mistakenly likened the rejection of the contract by the bankruptcy court to a taking in eminent domain where fair market value represents the measure of damages.

The party damaged by the rejection of an executory contract has the right to expect the benefit of the remedies provided by the law of contracts, not the

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[5]The District Court in valuing the acreage for reorganization purposes said: "There is absolutely no accepted valuation approach which can be used on these properties. No appraisal method which is to be found in any textbook will fit these problems." (App. 00765).

supposed fair market value of his contract or the value of the property determined as in an eminent domain proceeding. There is a great deal of difference in determining damages for breach of contract and the value of an asset for reorganization purposes. Cf. *Taylor v. Colorado State Bank*, 165 Colo. 576, 440 P.2d 772 (1968), *A to Z Rental, Inc.*, 413 F.2d 899, 908 (10th Cir. 1969) and *Williston on Contracts*, 3rd Ed. Sec. 1325, p. 142 with *TMT Trailer Ferry v. Anderson*, 390 US 414, 452 (1968), *Palmer v. Conn. R & Light Co.*, 311 US 544, 558, 559 (1941) and *Campbell v. American Fabrics Co.*, 168 F.2d 959, 962 (2nd Cir. 1948).

Before it could consider all of Petitioners' evidence and argument, however, the District Court made valuation findings for KRC's remaining interests in the Canadian Arctic Island permits in the reorganization proceedings based primarily on the EMV theory[6] and then proceeded to announce it would adhere to those values so far as Petitioners' damage claims were concerned.

The Court of Appeals found "no error in law in the selection" of that theory. However, instead of using known facts, such as existing reserve quantities, actual drilling success ratios and a realistic number of drillable prospects in working the EMV formula, the Trustee's expert had utilized assumed reservoir quantities, assumed drilling success ratios and a limited estimate of drillable prospects having no relation to reality. The Court of Appeals apparently missed the purport of our criticism of the use made of the EMV theory, for it wrote the rebuttal evidence directed to its application "was basically to demonstrate how small variations in the several elements can produce large changes in the result." (Appendix, p. 26) The opinion validates the EMV

[6]The EMV technique and its formula ($EMV = \sum_{i=1}^{t} Pi\ Mi$) is used to account for risk by considering a series of events which could occur realizing that only one can actually occur. To have any validity the formula must use as much known data as is available — a procedure not followed in its application in this case where assumptions were substituted for real facts.

probability theory without discussion of its elements, limitations and application.

It went on to hold, despite the fact that no court in the land, including the Colorado courts, has ever before validated such a theory or discussed its application, "that the method and resultant figures were in accordance with the Colorado law on damages in all actions such as this * *". (Appendix p. 26) The District Court had stated when adopting the theory in the reorganization proceeding that:

> "*The methodology used to formulate the report is one based upon theory of probability. It was one that I — as I have already mentioned, I have extreme difficulty following. I now understand it — I think.* I believe it's valid. I think it's accurate. I think it's a novel, imaginative way to approach the probability of finding gas or oil somewhere on the 23,687,733 acres of land and water in which King has an interest. I think it meets all the tests of *Consolidated Rock Products,* and I think the United States Supreme Court will, if it ever gets a chance, accept it if the United States Supreme Court is confronted with the facts we are confronted with here. (App. 00773)

In choosing to adopt and misapply what it called this "novel, imaginative" probability theory and its formula in lieu of working from known figures, the District Court and the Court of Appeals have accepted the unknown for the known. They completely ignored the uncontroverted evidence (1) that 11.3 trillion cubic feet of natural gas has been delineated in the Sverdrup Basin where the permits in which Petitioners were interested were located; (App. 00069) (2) that there were known reservoir figures available for use in the EMV formula and it was not necessary to assume reservoir quantities, (App. 253, 00079-00155, 00118-00155); (3) that there was a known drilling success ratio in the area available for use

in the EMV formula and it was not necessary to assume one (App. 00355-00358, Ex. 17, 18, 00837-00843); (4) that there were 300 to 500 prospects, plays and traps yet to be drilled (App. 00849) even though the Trustee's expert assumed, for purposes of working the EMV formula, that there were only 25 prospects in the entire area (App. 501-503).

The experts presented by both Petitioners and the Trustee were predicting a gas pipeline would be built into the area by 1986 or 1987 with production to begin when producers could attach their wells to a pipeline. (App. 141, 00933). The low oil and gas quantities which the Trustee's expert attributed to the permit properties by a complete misapplication of the EMV formula, and which the District Court and the Tenth Circuit accepted, simply do not equate with industry known data.

Petitioners' experts were able to show, despite its infirmities, that a proper application of the EMV theory and its resultant formula would have produced values much closer to those contended for by Petitioners who used the net present value method of calculating breach of contract damages.

The lower Federal Courts in this case are the first anywhere to sanction use of the EMV probability method and then they let it be used with assumed rather than known data. Neither the District Court memorandum opinion or the Tenth Circuit's opinion discuss the various elements of its formula, its proper application or the necessity of using known data wherever it exists.

Without critical evaluation, examination and discussion a new rule of evidence (the EMV formula) ought not be validated for use in our courts and become a substitute for a thorough consideration of known facts. The EMV probability theory, accepted by the District Court and the Tenth Circuit — so obtuse that the District Judge, when adopting it in the reorganization proceeding said "I now understand it, I think." (App. 00773) — cannot be permitted to substitute for the time tested rules for determining damages for breach of contract.

A CONTRACT CANNOT AT THE SAME TIME HAVE DIFFERENT VALUES — ONE FOR REJECTION PURPOSES AND ANOTHER FOR COMPUTING DAMAGES FOR THE REJECTION

At the rejection hearing the reorganization court heard testimony that the value of the Consolidated interests ran from $10 million to $20 million (App. 41-45), with commensurate values for the John M. King Estate and Lakeshore interests. These values far exceeded the amounts due under each of the contracts. Finding that the benefit to KRC far exceeded the burden, the reorganization court rejected the contracts as executory.

However, when determining the damages arising from its rejection, largely on the EMV theory, the same court held the same Consolidated interest to be worth between $2,066,000 and $2,580,500 with the John M. King Estate interest to be worth between $1,033,000 and $1,291,300 while the Lakeshore interests were valued from $645,600 to $887,900 (App. p. 37). A once valuable piece of property no longer had any value to the Petitioners. This had the result of permitting the reorganization effort to retain the downpayments made on the contracts by Petitioners and the further payments Consolidated made to apply on the exploration program. It resulted in transferring the value of Petitioners' contracts to the creditors,[7] KRC thus kept the downpayments which had been made on contracts and also retained the interests.

Having found it was more beneficial to the reorganization effort to reject the agreements KRC made in 1969 with the Petitioners as executory rather than be ordered to perform the agreements, the District Court had the duty to find the Petitioners to be creditors of the bankrupt estate at least to the extent by which the estate benefitted from the rejection.

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[7]The court held KRC to be insolvent and its plan of reorganization provided only for KRC's creditors — not its stockholders.

It is contrary to all principles of law, equity and bankruptcy to permit the Court and its Trustee to use one value for rejection purposes and another and completely different value when determining damages for the rejection.

VII

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT
No. 78-1780

FILED
United States Court of Appeals
Tenth Circuit
JAN 31, 1980
HOWARD K. PHILLIPS
Clerk

In the Matter of: KING RESOURCES COMPANY, Debtor,	
CONSOLIDATED OIL & GAS, INC., ESTATE OF JOHN M. KING, Bankrupt, and LAKESHORE ASSOCIATES, Appellants, v. KING RESOURCES COMPANY, Appellee,	Appeal From The United States District Court For The District of Colorado (D.C. # Civ. 71-B-2921)

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Robert R. Marshall, of Rodden and Marshall, Denver, Colorado, for Appellant, Lakeshore Associates.

John S. Pfeiffer, Denver, Colorado (Robert J. Kapelke and Stephen Klein, Denver, Colorado, with him on the Brief), for Appellee, King Resources Company.

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Before Seth, Chief Judge, HOLLOWAY and McWILLIAMS, Circuit Judges.

SETH, Chief Judge

King Resources Company, KRC, had acquired Canadian oil and gas prospecting or exploration permits which covered some twenty-three million net acres in the Canadian Arctic Islands. KRC contracted in 1969 to sell to John M. King an undivided one sixty-fourth interest in the permits for about two million six hundred thousand dollars, with the buyer to perform certain obligations by way of work and exploration required of permit holders. Similar contracts were entered into with Consolidated Oil & Gas, Inc., COG, for a one thirty-second interest for about five million two hundred thousand dollars plus the work obligation, and with what is now Lakeshore Associates for a one one-hundred-twenty-eighths (1/128) interest for the same purchase price proportionally.

In March of 1972 the Trustee of King Resources Company filed under 11 U.S.C. §516(1) a petition to reject the contracts with COG and with John King. Lakeshore and the Trustee stipulated to a rejection of the Lakeshore agreement. The trial court found the agreement with King to be executory and authorized rejection. This was affirmed by King v. Baer, 482 F.2d 552 (10th Cir.). COG did not contest the rejection petition and the trial court ordered rejection of its contract in January of 1977.

With the rejection orders and stipulations the parties buying interests had as their remedy claims against the bankrupt estate. 11 U.S.C. §602. These were filed, the Trustee objected, and the claims were tried to the District Court. The court concluded that no damages had been suffered by the claimant by reason of the rejection because the value of each agreement was less than the balance due on each by way of the purchase price and work. The court found this to be so considering 1971 or 1977 values.

The rejection was in August of 1971 and the "breach" was at that time under 11 U.S.C. §103(c), and Workman v. Harrison, 282 F.2d 693 (10th Cir.). The rejection prevented the claimants from acquiring any interest in the permits.

This case is, of course, an action for damages for breach of contract, and the measure of damages is to be

determined under Colorado law. In Taylor v. Colorado State Bank of Denver, 440 P.2d 772 (Col.), the court held that the plaintiff be awarded compensatory damages to place him in the position he would have been in had the breach not taken place. *See also* our decisions applying Colorado law in A to Z Rental, Inc. v. Wilson, 413 F.2d 899 (10th Cir.), and in Intermountain Rural Electric Ass'n v. Colorado Central Power Co., 322 F.2d 516 (10th Cir.).

Under the several contracts the purchasers were to receive *undivided interests* in the prospecting permits. The permits, to describe them in general terms, were from the Canadian Government for described tracts, and provided for the ultimate acquisition of leases of tracts or parts thereof if the exploration and related conditions were fulfilled. Thus acreage could be earned by exploration and development work and if the applicants qualified.

Under the contract between the purchasers and KRC, the buyers were to pay the purchase price in a series of payments, and were to pay to KRC to perform or have performed a substantial amount of exploratory-development work. KRC was to itself pay for a large portion of the work. This work was basically to fulfill the permit conditions, but also to test the acreage for the benefit of the parties. Some or all of the purchasers provided funds for some exploration work and made some initial payments. The contracts were executory as above mentioned.

The date of "breach" by KRC is fixed by the rejection and the damages are to be ascertained as of that date. Thus what was the recovery which would make the purchasers whole as of that date? As we said in King v. Baer, 482 F.2d 552 (10th Cir.), wherein we held that the contracts here involved were executory:

> "Rejection of the executory contract constitutes a breach of contract as a matter of law which entitles the other party to the contract to assert a claim for such breach for determination by the court." (Citing Workman v. Harrison, 282 F.2d 693 (10th Cir.).

In the "whereas" recitations in the contract between KRC and Consolidated Oil & Gas, dated December 26, 1969, it was stated:

> "Whereas, it is the desire of the Purchaser to obtain an undivided interest in the Permits as set forth in Exhibit 'A', or any leases issued in exchange therefor and to participate with KRC in the exploration program pursuant to the terms and conditions as hereinafter set forth, . . ."

Also KRC therein agreed to convey an undivided fraction of KRC's working interest in and to the permits or leases issued in exchange therefor.

The contract with Consolidated, for example, provided for participation in the cost of the initial exploration program by it to the extent of twenty-five percent of $20,982,964.00 (with KRC paying its share), and one thirty-second of exploration thereafter. The other contracts were basically the same but in different amounts.

The purchasers thus became dependent upon the performance by KRC of the major portion of the exploration burdens required to retain the Permits. A risk of the business was thus that of the ability of the other undivided interest owners to perform in order that the Permits not be lost. As it developed KRC was unable to carry its share, and the interests it held were converted in trades with others to interests of a different nature with the assumption of the exploration burden by the party to whom the interest was traded. But in any event, if we ignore the risk in selecting the partners or other undivided interest owners, the damages suffered by the purchaser parties herein can be ascertained under Colorado law and prevailing methods and practices.

It is common knowledge that valuations of nonproducing oil and gas properties and interests therein held by contract are frequently made. The testimony of reservoir engineers and geologists for this and for

regulatory purposes is thus a regular occurrence. It is obvious that it is not an exact science and that much in the way of estimates and probabilities are included. The problem here is, of course, complicated by the size of the tracts and, as the record shows, the relatively small amount of development in surrounding areas. The experts for each party found enough data on which to apply their theories, estimates, computations, and formulae. They each had the opportunity to examine and to criticize the theory and the figures of the other side. Thus the trial judge was presented with a well defined choice of theory or method, and with an opportunity to examine the consequences of an application to the facts. We have examined the divergent theories presented by the parties and the computations, and we cannot say that facts as found by the trial court were clearly erroneous.

Each party presented a valuation theory which was based on what can be called sampling and probabilities. Each also added additional factors or elements of varying exactitude, and with some use of alternate methods for "verification." The dollar consequences of the application of the two methods were quite different. It would serve no purpose to here describe in detail the methods as the parties are intimately familiar with them. It is sufficient to refer to them generally and to say that we find no error of law in the selection of one of the theories by the trial judge, and it then became a fact question to be resolved by the trial judge.

The method urged by the appellant was presented by Mr. Hewetson, and it basically was an evaluation of the various categories of reserves in the entire Canadian Arctic with an estimated ultimate production of 5.6 billion barrels of oil and 39 trillion cubic feet of gas. They assumed by reason of the size of the Canadian Arctic, the size of the permit area, and the apparent uniformity of the geology that the permit lands would produce a proportionate share. This testimony was refined by testimony as to the number of wells then drilled in the Arctic, about 128, the number of successful wells, about twenty-three to twenty-five, and also as to the existence of

particular "fields." These "fields" were in several categories of certainty, and some were close to some of the permit areas.

Of course, all the experts testified as to the great costs involved in exploration and development, the uncertainties, the price variations, the time elements to a greater or lesser degree, and transportation costs for both oil and gas. The experts on both sides, of course, had available geological information and considerable data on the wells drilled although none had been drilled in the permit areas. The witnesses also used extensive seismic data which was available to them, but not necessarily available to the witnesses on the other side.

The Trustee's witness presented testimony as to several farmouts and trades for permits in the general area. These transactions covered large tracts, and a value on a per-acre basis for a one hundred percent interest was derived from this data to establish values of the permit lands. There is no evidence to show that these were other than ordinary farmouts which were made at arm's length and properly computed to a one hundred percent interest.

The Trustee also put on testimony to develop a method of valuation referred to as the Expected Monetary Value Method. This was based on about twenty-seven separate areas in the Arctic Islands; a probability of discovery of certain quantities of gas or oil or of dry holes was applied, and the quantities estimated was computed. The price, time, development costs, and marketing costs were worked into the formula. A discount rate of nine and one-half percent was used. The total permit area was divided into twenty-five areas and the percentage interest of each purchaser in each area was thus assigned a value.This value was then related or compared to the farmout-trade figures.

The witnesses of plaintiff, during a recess for that purpose, examined data in Canada which had been developed by the Trustee's witnesses and which was the basis for some of the trial testimony and exhibits. The plaintiff then put on rebuttal evidence directed to the

application made of the Expected Monetary Valuation Method. This was basically to demonstrate how small variations in the several elements can produce large changes in the result. It was directed primarily to the success ratio of the drilling which had been done.

It is apparent that each side had an adequate opportunity to develop their valuation theory and to demonstrate the results thereof. The trial judge chose to use that advanced by the Trustee and so arrived at his findings of fact. As we have indicated above, we cannot say that these were clearly erroneous. They are supported by the record, and are well within the trial court's discretion and its proper fact-finding function. We must also hold that the method and the resultant figures were in accordance with the Colorado law on damages in all actions such as this, cited hereinabove.

The record demonstrates that the trial court made the proper determination of the obligations of the purchasers remaining unfulfilled by way of purchase price and contribution to exploration work to keep the permits in good standing. The work obligations were substantial, and the permits depended on someone doing *all* the exploratory work required therein. Consolidated had paid all its payments on the purchase price and some $1,219,824.00 of the exploration costs.

In any event, the trial court found that the value of each plaintiff's undivided interest in the permits at any pertinent time was less than the obligations due, and thus no damages were suffered.

The valuation of the Canadian Permits to KRC had been the subject of proceedings in the reorganization court over a considerable period of time and was proceeding when the first portion of this case on appeal was before the same judge. The experts of the Trustee, Sproule and Associates, had presented reports for valuation of the permits for the plan of reorganization. The valuations in the plan of reorganization hearings were contested, but this trial judge there accepted the Sproule valuations. Consolidated sought to stay approval of the

plan of reorganization pending the proceedings on the claims here involved.

The appellants urge on this appeal that the trial judge should not have heard this case because he was considering the values of the permits for reorganization purposes, and in accepting the Sproule valuations, he became committed to them for this case. He did express the view that he should be consistent in both proceedings. However, no objection was raised until this appeal from the adverse ruling. Whether or not the objection has any validity, it is apparent that it comes too late. In United States v. Cotton, 567 F.2d 958 (10th Cir.), we considered a late attempted disqualification. The trial judge should have the matter brought to his attention before he proceeds with the case. Shadid v. Oklahoma City, 494 F.2d 1267 (10th Cir.). There was no personal bias here alluded to. *See* United States v. Irwin, 561 F.2e 198 (10th Cir.); United States v. Bray, 546 F.2d 851 (10th Cir.); and Davis v. Cities Service Oil Co., 420 F.2d 1278 (10th Cir.).

In conclusion, we find no basis for a disqualification by reason of the several determinations made by the trial judge during the course of a bankruptcy proceeding under the decisions in American Employers' Ins. Co. v. King Resources Co., 545 F.2d 1265 (10th Cir.), or in United Family Life Ins. Co. v. Barrow, 452 F.2d 997 (10th Cir.).

AFFIRMED.

MAY TERM — June 6, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

IN THE MATTER OF:	)	
	)	
KING RESOURCES COMPANY,	)	
	)	
Debtor,	)	
	)	
CONSOLIDATED OIL & GAS, INC., ESTATE OF JOHN M. KING, Bankrupt, and LAKESHORE ASSOCIATES,	)	No. 78-1780
	)	
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
KING RESOURCES COMPANY,	)	
	)	
Defendant-Appellee.	)	

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellants in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR DISTRICT OF COLORADO

In the matter of KING RESOURCES COMPANY, Debtor	
CONSOLIDATED OIL & GAS, INC., ESTATE OF JOHN M. KING, Bankrupt, and LAKESHORE ASSOCIATES, Plaintiffs, vs. KING RESOURCES COMPANY Defendant.	IN PROCEEDINGS FOR REORGANIZATION OF A CORPORATION No. 71-B-2921

MEMORANDUM OPINION

In December 1969, King Resources Company (KRC) and the Claimants Consolidated Oil & Gas, Inc. (COG), John M. King, now a bankrupt (JMK), and Lakeshore Associates (Lakeshore) entered into contracts for purchase of undivided interests in KRC's interests in certain Canadian Federal Oil and Gas Exploration Permits (Permits). Said permits cover approximately 35,654,234 gross acres in the Canadian Arctic Region. COG was to obtain a 1/32d working interest, JMK a 1/64th working interest, and Lakeshore a 1/128th working interest under the contracts. Each agreement called for the payment of an initial contract price payable in a downpayment followed by installments, together with an exploration obligation. In the case of COG the contract price was $5,218,242. Its downpayment was

$443,550 with six installments of $795,782 due. COG's exploration obligation was 25% of exploration costs up to $5,218,242 with a commitment thereafter of 1/32d of such costs. The obligations of the other two claimants herein are identical to that of COG except for a proportional reduction based upon the working interest each was to acquire.[1] In each case, interest on the unpaid balance of the price not attributable to the exploration commitment accrued at the rate of 6% per annum. Each of the claimants only has paid the initial downpayment together with some exploration expenses. However, none has paid the full contract price or work commitment. Each contract provides that it shall be governed by the law of the State of Colorado.

On January 29, 1971, COG filed a lawsuit in Denver District Court against the KRC seeking rescission or, in the alternative, damages for alleged breaches of the December 1969 contract. On August 14, 1971 the within proceedings were commenced against KRC. On March 17, 1972 the Trustee of KRC filed, under Section 116(1), 11 U.S.C. §516(1), a petition to reject as an executory contract the agreement with COG. In March 1972 the Trustee also filed a petition to reject the agreement with JMK. A stipulation was entered into between the Trustee and Lakeshore, agreeing to the rejection of said agreement. This Court ordered that the JMK agreement was executory and authorized its rejection in May 1972. Said order was affirmed in *King v. Baer*, 482 F.2d 552 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068. Similarly, the COG agreement was rejected pursuant to order of this Court on January 18, 1977 following no objection thereto by the claimant.

Each claimant has filed a claim herein for damages under Section 202 of the Act, 11 U.S.C. §602. The Trustee objected to each claim. Trial was held thereon on August 29-31, 1977.

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[1]It should be noted, in addition, that JMK and Lakeshore differed from COG in that the former were to pay their contract price in twelve rather than six installments.

The issue is the amount of damages suffered by each claimant as a result of the Trustee's rejection of the executory agreements. The Trustee contended that rejection constitutes a breach of the agreement as of the date of the filing of the petition, 11 U.S.C. §103(c), and that as of said date each claimant owed more on the agreements than the value of the agreements themselves. Thus, the Trustee argues, no damages were incurred as a result of the rejection. COG, as the lead claimant herein, contended that the *rejection* on January 18, 1977 is the breach date and that as of said date it was deprived of the benefits of a future income stream to be realized from the production of oil and gas in the Canadian Arctic in the amount of $137,900,000. The claimant contends that the knowledge of the area possessed in 1977 properly can be considered in arriving at said value of the agreements. In addition, it argues that the various offsets and credits which it claims COG is entitled to apply to the purchase price substantially reduce its outstanding obligations under the contract. Thus the argument is made that the present value of the contract far exceeds the remaining obligations, and damages are due thereunder. JMK and Lakeshore claimed proportionate shares of $137,900,000 as damages.

COG presented expert testimony through Mr. John Hewetson, a representative of JLJ Exploration Consultants Ltd., a private independent consulting company of geophysicists, geologists and engineers. Additionally, Mr. William G. Fisher testified as a representative of D & S Petroleum Consultants Ltd., a private petroleum engineering company in Canada. Both experts estimated the amount of proved, probable, and possible reserves discovered and yet to be discovered in the Canadian Arctic. They testified, and the formal report which they submitted to the Court predicted that an ultimate of 5.6 billion barrels of oil and 39 trillion cubic feet of gas would be found in the entire Canadian Arctic area. They assumed, because of the enormous size of the area, and what they considered to be a general reliable similarity in the geology of the area, together with large permit land

acreage, that these permit lands would contain an average share of the total predicted reserves. This is not to say that they predicted equal production per acre. Indeed, Mr. Fisher testified that a very small percentage of the permit acreage would be productive. However, their predictions and assumptions are based upon an absolute equal averaging of the total reserves over the permit lands. The experts further testified that there were enormous costs and innumerable uncertainties connected with the exploration and discovery of hydrocarbons in the Canadian Arctic. They assumed an inflationary trend for the costs and finally reduced the predicted income stream to present worth by using an 8% discount factor. This rate was testified to as a no risk rate. COG, under their analysis, would have to spend approximately $19 million by the year 1987 before it began to realize any positive cash flow. It would not reach a breakeven point until 1991. However, Mr. Fisher testified that no consideration was given to the cost of such funds to COG in arriving at projected benefits.

The Trustee presented expert testimony through Mr. Noel A. Cleland, a vice president of Sproule Associates, a firm of consulting engineers and petroleum geologists located in Canada. Mr. Cleland testified in detail concerning the Sproule methodology at arriving at a going concern value of the land in question. In contrast to the claimants' experts, Sproule analyzed 25 individual geological prospects to calculate a range of possible oil and gas therein. They then considered the time, rate of production, royalties, prices, and costs connected with the exploration, discovery and delivery of these potential reserves, using a 9-1/2% no risk discount rate to reduce their projections to present value. Sproule then considered the various risks involved in finding the projected reserves. They thus arrived at a going concern value of the agreement for COG as of August 14, 1971 of $2,580,500. This was translated to a per acre value of $3.69. It also was testified to, and a formal report submitted thereon, that if present information is used a going concern value to COG as of June 1, 1977 is

$2,219,600. This translates to a per acre value of $4.99. Mr. Cleland testified, in addition, that there were several comparable sales or trades of property in the Canadian Arctic. Among these were what was testified to as the Sun Oil and Global Arctic farmout agreements, as well as four independent trades or sales of acreage. Mr. Cleland testified to a methodology of valuing said transactions and arrived at a per acre value for the Sun Oil transaction of $3.11. The Global Arctic transaction yielded a value of $3.62 per acre. The weighted average of the four other sales or trades was $4.24 per acre. All of these, therefore, compared favorably to the per acre value reached by application of the Sproule methodology for going concern value. It was testified that to arrive at a fair market value, as opposed to going concern value, for the permit lands, a multiplier of 0.8 of the going concern value should be used. Thereby Sproule arrived at a fair market value for COG as of August 14, 1971 of $2,066,000. As of June 1, 1977 the fair market value to COG is $1,775,700.[2]

As stated, each of the contracts provides that it shall be governed by the law of the State of Colorado. The fundamental rule in breach of contract actions is to place the wronged party in the same position he would have occupied absent any breach. *Taylor v. Colorado State Bank of Denver,* 165 Colo. 76, 440 P.2d 772, 774 (1968). This, too, is the rule in this Circuit, it being commonly labeled as the benefit of the bargain rule. *A To Z Rental v. Wilson,* 413 F.2d 899 (10th Cir. 1969); *Ellis Canning Co. v. Bernstein,* 348 F. Supp. 1212, 1233 (Colo. 1972).

While the parties seem to make a great deal of their differences as to whether damages are to be computed as of August 14, 1971 or some later date, the application of the above stated rule in this case makes the argument

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[2]The value of the other agreements, of course, must be reduced according to the proportionate working interest being purchased in each case. As far as going concern value is concerned, the 1971 and 1977 values for JMK are $1,291,300 and $1,109,800. For Lakeshore the values are $645,600 and $554,900. The fair market values for JMK in 1971 and 1977 are $1,033,000 and $887,900. Those values for Lakeshore are $516,500 and $445,000.

academic. The rejection constituted a breach as a matter of law as of the date of the petition herein. 11 U.S.C. §103(c); *Workman v. Harrison*, 282 F.2d 693, 699 (10th Cir. 1960). Whether the value of the contract at said date, see *Workman v. Harrison, supra*, must be arrived at without consideration of present knowledge, or whether such later information can be considered, I find that any injury to the claimants is basically the same under the facts presented. Evidence was admitted on valuations both in 1971 and 1977. All the evidence was considered and weighed as set forth below. The contentions of offsets and credits as of both times was considered. The value of the agreements, using all the evidence before me, is less than the amount of remaining obligations on each agreement as of either date. As is concluded below, this set of circumstances means that no compensable injury exists.

The authorized rejection of the agreements divested the claimants of whatever rights they had to acquire interests in the permits, and thus presumably in the underlying oil and gas, if any.[3] This deprivation is similar in many respects to an involuntary taking under the laws of eminent domain, and the law therein as to damages is persuasive. I am compelled, in arriving at the value of the contracts, to find the fair market value of the property which claimants were deprived of. Of course, fair market value is that value which a seller under no compulsion to sell will take, and what a buyer under no compulsion to buy will give, for the property, given equal knowledge. See *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1400 (10th Cir. 1974). The best evidence of fair

[3]It may well be that the claimants acquired nothing more under the contracts than a right to help maintain the permits, which apparently could be abandoned, taken away, lost as a consequence of failure or inability to perform required work obligations, and the like. Certainly, the purpose of the parties was to explore thereunder for commercial quantities of oil and gas. However, it must be held in mind that claimants purchased interests in the permits only, and whether that interest even rises to the level of a legally compensable vested right is a matter seriously in doubt. See *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973); *United States v. Fuller*, 409 U.S. 488 (1973); *Petry v. Denver*, 123 Colo. 509, 233 P.2d 867 (1951).

market value are sales of comparable property within a reasonable period of time. *Id.; United States v. Sowards,* 370 F.2d 87, 89 (10th Cir. 1966). Certainly, the law allows other elements besides comparable sales to be considered in arriving at a fair market value, *see generally, United States v. Sowards, supra,* 370 F.2d at 90, however,

> ". . . [w]hatever method is employed, the evidence offered must have a bearing on what a willing buyer would pay a willing seller for the property on the date of the taking." 370 F.2d at 90.

Any other elements considered must be based upon "substantial facts and circumstances" in order to have probative value. *United States v. 25.02 Acres of Land,* supra, 495 F.2d at 1400. Mere hoped for opportunities or speculation, of course, are not of any weight in arriving at the goal. This is not to say that becauses damages herein may be difficult to ascertain they cannot be allowed. Such is not the law, *A To Z Rental, Inc. v. Wilson, supra,* 413 F.2d at 908; *Ellis Canning Co. v. Bernstein, supra,* 348 F. Supp. at 1233, and I specifically do not so hold. However, it is the law that in any legal context, speculative, elusive, imaginary, or hoped for damages, however genuine the belief is in their existence, cannot be recovered. In addition to the cases already discussed see *Kimble Laundry Co. v. United States,* 338 U.S. 1, 20 (1948); *Westric Battery Co. v. Standard Electric Co., Inc.,* 482 F.2d 1307, 1317 (10th Cir. 1973); *Lee v. Durango Music,* 144 Colo. 270, 278, 355 P.2d 1083 (1960).

The testimony of Messrs. Hewetson and Fuller is riddled with just those kinds of assumptions regarding reserves, additional discoveries which they feel will be made, costs, prices, and future governmental actions as to make their predictions of damages, at the least, questionable. If their testimony is probative at all in light of the authorities discussed above, I am compelled to assign to it little weight. The gross averaging kind of methodology they employed in itself raised serious questions in the Court's mind during the trial of this matter — which I communicated to counsel throughout.

It is grounded in the blatant assumption that if one has sufficient opportunities to throw the dice, the "law of averages" says he will come out ahead. This is what the claimants' experts said was the situation, given the number of chances COG otherwise would have had in relation to the total size of the Arctic. The predicted gross condition of the Arctic is somehow condensed to an assumed truth for the specific permits in question. Yet there was no testimony to contradict the evidence of the Trustee that not one successful well had been sunk on lands covered by the permits. Indeed, it was brought out that a dry hole was sunk directly on land under which the claimants' experts hypothesized that "highly possible" reserves existed. Thus, there was no convincing evidence presented by the claimants of any past positive experiences upon which to substantially base any of their conclusions. Indeed, it must be said that the Sproule testimony of going concern value itself rested upon certain assumptions. However, Mr. Cleland testified at length concerning the various risk factors taken into account on each specific geologic prospect in the area. In contrast the claimants' experts testified that the discount rate they used of 8%, to discount future income predictions to present value, was a no risk rate. The claimants apparently contend that no risk should be considered. It is totally incredible, however, given the task at hand, to not consider the inherent and real risks in finding any commercial reserves, under permit lands, within the time frame used, under the circumstances of this case.[4]

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[4]The claimants' experts used inflation rates of 10%, 7%, and 5% over the period considered. Consideration of inflationary trends now is permissible under the law of this Circuit. *DeWeese v. United States*, _____ F.2d _____, Slip Opinion at pp. 11-14 (5-3-78); *Steckler v. United States*, 549 F.2d 1372, 1375-1378 (10th Cir. 1977). It must be noted, however, that ". . . only such estimates of future changes in the purchasing power of money as are based on sound and substantial economic evidence" may be considered. *DeWeese v. United States, supra*, Slip Opinion at 12. None of the experts herein were qualified as experts in that area and offered no substantial economic evidence for their projections. The evidence at the time of trial was admitted and I

The Sproule testimony as to value is buttressed immeasurably, given the comparable sales approach used as a "check" upon their going concern valuation. The sales or trades examined and testified to were comparable both as to time and location. Indeed, the Sun Oil and Global Arctic farmout transactions occurred as to identical lands to those being considered here in one case and nearly identical lands in the other. They lend a high degree of credence to the Sproule testimony. Given the respective methodologies and elements weighed by each set of experts, I must and do reject the testimony of the claimants' witnesses in favor of the Sproule testimony, and find that the value of the contract to COG on August 14, 1971 was in a range between $2,066,000 (fair market value) and $2,580,500 (going concern value) testified to by Mr. Cleland. As of June 1, 1977 the range is between $1,775,700 and $2,219,600.[5]

Having now arrived at the value of the contracts, the question is whether the claimants have suffered any damages. Admitted at the trial were accounting exhibits prepared by a representative of KRC, based upon the books and records of the debtor, showing that as of August 14, 1971 the amounts owed under the contracts for purchase price and work obligations by COG, JMK, and Lakeshore are, respectively: $8,253,219.97; $3,842,958.74; and $2,387,640.90. As already stated the claimants contend that various credits occurring after said date must be taken into account, and that the

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[4]Continued
shall not disregard it. However, it is clear from the recent pronouncements of the Court of Appeals that in any event a reasonable inflation rate must be accompanied by an equally reasonable discount factor. As stated in the body of the Opinion, a no risk factor herein is unreasonable.

[5]Any exact dollar value is unrealistic in light of the actual situation. However, the going concern figure may be closer to the value of the agreement to COG. With regard to JMK and Lakeshore, it is more appropriate to use the lower range of the valuations set forth above in footnote 2 — that which Sproule called fair market value — in determining any "exact" dollar value since neither can be considered a going concern in this field by any stretch of the imagination.

amounts remaining due thereby are reduced to almost "minor" levels. Those credits consist in the case of COG of contributions to KRC for the work program, contributions to Sun Oil Company on the work program, claimed 25% shares of various amounts KRC received from Sun Oil and BP Oil & Gas Ltd., and finally a 1/32nd interest in the original purchase price of abandoned permits.

It is clear from the agreements themselves that each claimant purchased a 1/32d, 1/64th, and 1/28th interest, respectively. Having bought said interests, any share in the benefits is limited to the size of the interest bought. Although COG contracted to pay for 25% of the initial work up to the specified amount, the agreement cannot be construed in any way other than to conclude that COG was a party to the extent of 1/32d (3.125%). Thus, the credits claimed in amounts received by KRC are overstated by 800%. The outstanding obligations under each agreement exceed the value thereof no matter what evidence is considered and despite allowances for credits.

Given the necessity dictated by the benefit of the bargain rule to place each claimant in the same position it would have been in without a breach, it is apparent that each claimant has substantially greater obligations under the contracts than the value of the agreements to each. In the circumstances, none of the claimants has sustained compensable injuries. See, e.g., *Minshall v. Case,* 148 Colo. 12, 21 (1961).

I have examined the rebuttal evidence of the claimants presented to the Court by way of deposition. I seriously question its propriety as rebuttal evidence. In any event, its substance does not alter my findings as to the credibility or weight of the testimony already discussed.

The claimants being entitled to no damages, their claims hereby are disallowed.[6]

DATED this 31st day of July, 1978.

BY THE COURT:
Fred M. Winner, Chief Judge

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[6]The additional claim of COG under a promissory note has been disposed of separately and is not affected hereby.

STATUTES INVOLVED

11 USC §516(1)

"516. *Special powers enumerated.* — Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter [§501 et seq. of this title] conferred and imposed upon him and the court —

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;"

11 USC §602

"602. *Rejection of executory contracts and unexpired leases —Assignment of future rent claims.* — In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter [§501 et seq. of this title], or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter [§501 et seq. of this title] and of the plan, its acceptance and confirmation, be deemed a creditor.***"

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-280

CONSOLIDATED OIL AND GAS, INC., ESTATE OF JOHN M. KING, BANKRUPT, AND LAKESHORE ASSOCIATES,
Petitioners

vs.

KING RESOURCES COMPANY, CHARLES A. BAER, Trustee of King Resources Company and PHOENIX RESOURCES COMPANY (a reorganized company formerly known as King Resources Company),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT, CHARLES A. BAER, TRUSTEE, IN OPPOSITION

JOHN S. PFEIFFER
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1200 American National Bank Building
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In the
Supreme Court of the United States

OCTOBER TERM 1980

No. 80-280

CONSOLIDATED OIL AND GAS, INC., ESTATE OF JOHN M. KING, Bankrupt, and LAKESHORE ASSOCIATES, *Petitioners,* *vs.* KING RESOURCES COMPANY, CHARLES A. BAER, Trustee of King Resources Company and PHOENIX RESOURCES COMPANY (a reorganized company formerly known as King Resources Company), *Respondents.*	ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT – BRIEF OF RESPONDENT, CHARLES A. BAER, TRUSTEE

STATEMENT OF THE CASE

For the most part, Respondent, Charles A. Baer, Trustee of King Resources Company (K.R.C.), is able to accept the statement of the case contained in the Petition. However, certain additional facts need to be mentioned.

The Petitioners contracted to buy undivided interests in certain Canadian Federal Oil and Gas Exploration Permits covering in excess of 35 million gross acres in Canadian Arctic regions. By their agreements, the Petitioners were to pay a down payment, certain regularly scheduled installments, and a proportionate share of exploration costs to maintain the permits. While each claimant paid its initial down payment plus some exploration expenses, none paid the full contract price or exploration obligations.

After the commencement of the K.R.C. reorganization proceeding, the Respondent Trustee filed his petitions to reject the contracts of Consolidated Oil and Gas, Inc. (Consolidated) and John M. King as executory contracts under Section 116(a) of the Bankruptcy Act, 11 U.S.C. Section 516(1). As stated in the Petitioner's Statement of Case, the Trustee and Lakeshore Associates agreed to the rejection of that agreement. The John M. King agreement was declared executory and rejected by the reorganization court. *King v. Baer*, 482 F.2d 552 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068. The Consolidated agreement was ordered rejected on January 18, 1977 after Consolidated took the position that it did not oppose rejection of its agreement. Thus, Consolidated conceded that there were substantial remaining executory obligations under the contract, and that its only potential recovery would be for damages, if any, suffered as a result of rejection. That was the issue tried before the reorganization court. The reorganization court's opinion of July 31, 1978 goes into much detail concerning the testimony which was presented to determine whether any damages were incurred as a result of rejection. *See*, Memorandum Opinion of the Reorganization Court in Petitioner's Petition at 29, 31-38. The reorganization court had before it a number of theories about how to value the interests in the permits. That value had to be determined by the court in order to compare it against the remaining obligations of the Petitioners under their contracts in order to determine whether any of the Petitioners had suffered damages. The trial court determined what the fair market value and going-concern values of the subject interests were to each Petitioner. It considered evidence of comparable sales or trades as a "check" against the various theories presented by the experts for both sides. *See*, Memorandum Opinion at 34-37 in Petitioner's Petition. Having found the values of the rejected contracts, the court was compelled to award no damages,

since the remaining executory obligations of the Petitioners to K.R.C. exceeded the determined values in each case.

As Petitioners suggest, the reorganization court's exposure to the particular properties which were the subject of the rejected contracts had occurred over the course of the entire reorganization proceeding. The interest of the debtor, K.R.C., in the subject properties was a matter which the reorganization court dealt with on a number of occasions in connection with determining the debtor's insolvency, and as a part of the plan of reorganization. The Petitioners were parties to the reorganization proceeding over its full course of nearly seven years. They were apprised at all times of the reorganization court's hearings with respect to the valuation of the subject properties. Over the several years and numerous hearings, Petitioners had every opportunity to participate in the reorganization proceedings. At the time of the trial on their claims, they were well aware of the reorganization court's ruling as to the value of the subject assets for reoganization valuation purposes. They made no objection to the trial being held before the reorganization judge until before the Tenth Circuit.

REASONS FOR DENYING THE WRIT

Contrary to Petitioner's suggestions, the decision of the Court of Appeals below does not depart from accepted judicial procedure, nor does it misapply any rules of law with regard to calculation of damages. The Petitioners suggest an interpretation of 28 U.S.C. § 455 for which even they in their Petition cannot cite a single supporting authority.

With regard to their contentions concerning damages, their arguments are more properly ones made to the trier of fact rather than this Court.

There exists no compelling reason for this Court to review this case, and the Petition for Certiorari should be denied.

I

APPELLANTS WERE AFFORDED DUE PROCESS BY THE REORGANIZATION COURT AND THAT COURT COMMITTED NO ERROR IN FAILING TO DISQUALIFY ITSELF.

Petitioners urge that the Court of Appeals and the reorganization court committed error in failing to hold that the reorganization judge was unable to accord Petitioners a fair trial. The Petitioners also contend that the reorganization judge was required to recuse himself *sua sponte*.

It must be noted that Petitioners do not claim any personal bias on the part of the reorganization judge, but merely that because he had considered valuation of the permits for reorganization purposes, and apparently had found the testimony of the Trustee's witnesses persuasive before, then he automatically was prejudiced. As the Court of Appeals properly recognized, the decision of a judge to recuse himself generally is acknowledged to be confined to the consideration and discretion of the judge himself. *See, e.g., Shadid v. Oklahoma City*, 494 F.2d 1267 (10th Cir. 1974). The Petitioners here made absolutely no complaint until after the judge's decision adverse to their position had been published. [1] To allow litigants to await the outcome of a judge's decision before raising the disqualification issue would be to promote a most reprehensible form of uncertainty, inefficiency and forum shopping.

This is especially so when, as is the case herein, the litigants did not allege a personal bias, but rather alleged prejudice arising out of the mere exercise of the judge's

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[1] Note that where as here the alleged ground for disqualification is asserted to be under 28 U.S.C. § 455(a), the parties may waive said ground. 28 U.S.C. § 455(e). In the light of the parties' full knowledge of the now alleged basis for disqualification they must be deemed to have waived the same.

judicial obligations—namely, his overseeing of an ongoing reorganization proceeding, during which time he had gained familiarity with particular assets, issues and other matters. Under the Bankruptcy Act, 11 U.S.C. § 1, et. seq., Congress vested jurisdiction for Chapter X reorganization proceedings in a single reorganization judge. The Act itself thus contemplated that the very proceedings in question here, involving executory contracts, the resolution of claims and the approval and confirmation of a plan of reorganization shall be heard by a single reorganization court. In general, facts learned by a judge in his judicial capacity are not a proper basis for disqualification. *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1977), *cert. denied*, 430 U.S. 931. There is absolutely no support, and Petitioners therefore cite none, for the proposition that the reorganization judge must recuse himself *sua sponte*, without any hint from the litigant itself. Judicial consistency normally is viewed as an admirable trait. As the Court of Appeals below noted, the trial judge expressed the view that he should attempt to be consistent. *See*, Opinion of the Court of Appeals, at Page 27 of Petitioners' Petition. There is absolutely nothing which Petitioners point to in their Petition to indicate that the reorganization judge was anything but fair and impartial in the trial of their claims. The Court of Appeals was legally correct in holding that there was no evidence of impropriety on the part of the reorganization judge and that Petitioners' request for recusal after the publication of an adverse decision was untimely.

II

THE LOWER COURTS PROPERLY DETERMINED THE MEASURE OF DAMAGES FOR REJECTION OF THE EXECUTORY CONTRACTS.

The Petitioners' contentions concerning damages are that the lower courts erred in not adopting the testimony

of Petitioners' experts, and that the testimony of Respondent's witnesses should have been rejected.

Petitioners' contentions to the contrary notwithstanding, the reorganization court properly recognized that it was faced with a very basic, straight-forward question of the amount of damages suffered as a result of rejection, or breach, of contract. The entire thrust of the Petitioners' argument is that the assumptions, predictions and calculations of their experts more accurately measured the value of the permits than either the assumptions, predictions or calculations of the Respondents' witnesses. The trial court is invested with broad discretion, as the Court of Appeals recognized, in such respects. The exercise of that discretionary jurisdiction simply is not a proper subject for review in this Court.

The reorganization court applied fundamently recognized principles of law in calculating damages. It recognized the need to determine the fair market value and going-concern values of the subject properties. It arrived at those values by placing greatest reliance on the evidence of comparable sales or trades which were before it. See reorganization court opinion at 34-35 of Petitioners' Petition. The court used these known values, arrived at through arms-length transactions, as a guide against which to measure the predictions and theories of the respective expert witnesses. The reorganization court properly exercised its discretion after comparing the testimony of all witnesses against the values of comparable sales or trades. Once the court arrived at the value of the Petitioners' contracts, it was compelled to find that Petitioners suffered no damages. As far as can be determined, the Petitioners do not contend that the lower courts erred in any of this methodology, but rather that they erred in failing to ascribe a high enough value to the subject properties. These arguments were properly addressed to the discretion of

the reorganization court, which rejected them. The Court of Appeals properly held that the findings of the reorganization court were not clearly erroneous and that the reorganization court had not erred in arriving at the calculation of damages. The arguments afford no proper or viable ground for granting the Petition for Certiorari herein.

III.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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